

(1982) 08 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Original Order No. 536 of 1977

Union of India (UOI)

APPELLANT

Vs

Apeejay Private Limited

RESPONDENT

Date of Decision : 03-08-1982

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : AIR 1983 Cal 271

Hon'ble Judges : Ramendra Mohan Datta, J;C.K. Banerji, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ramendra Mohan Datta, J.—This appeal arises from the judgment and order of Sabyasachi Mukharji, J. dated May 9. 1977: (Reported in AIR 1977 NOC 263 (Cal) in an application for setting aside the award of the Arbitrator Sri S. K. Sen dated June 12, 1969.

2. The matter arose out of a contract between the Union of India represented by the Iron & Steel Controller and the respondent (hereinafter called Apeejay) regarding supply of enamelled sheets, black plates etc. from the United States of America which was to be financed out of the Development Loan Fund placed at the disposal of the Government of India by the U. S. Government. One of the terms of the said contract was for security deposit to the extent of 5% of the contract value of the goods by Apeejay. Such security amount at the calculated rate amounted to a sum of Rs. 1,99,156. In terms of the said contract a guarantee bond was executed by Apeejay in favour of the Union of India in lieu of the said security amount through Punjab National Bank. In the absence of the Arbitrator's records which were not placed before us during the hearing of this appeal it is difficult to appreciate what was meant by the Arbitrator and by the learned Judge of the court below when they referred to the performance guarantee bond and what were the terms and conditions thereof. All that we have ascertained is that the guarantee bond could be enforced by forfeiture in

case of breach of the said contract.

3. It appears that the facts are that the Union of India opened three letters of credit each dated Jan. 20, 1962 of the total value of \$829716.00 with the Chase Manhattan Bank of New York, U.S.A. Against the said letters of --credit Apeejay in terms of the said contract shipped 53.745 tonnes of contracted materials within the time stipulated but failed to ship the balance quantity within such stipulated period. The Union of India no doubt -- extended such time for shipment at the request of Apeejay but the time was so extended without prejudice to their right to levy liquidated damages for delay in shipment in accordance with the terms of the contract. The terms of the contract provided that except in the case of Force Majeure Apeejay would be liable to pay such liquidated damages for delay in shipment even though the time might be extended by the Union of India.

4. After such extension Apeejay shipped certain quantity of goods but failed and neglected to ship 162 tonnes being the balance quantity of the said materials entailing forfeiture of the said security deposit on account of such breach.

5. In breach of the said agreements the principal of Apeejay drew in U. S. dollars to the extent of \$6910.13 in the United States representing the amount of remuneration which was payable to Apeejay in Indian currency in India. According to Union of India there was wrongful breach on that account entailing forfeiture of the said security deposit amount by enforcing the said bank guarantee.

6. The Union of India complained of further breach on the part of Apeejay which wrongfully shipped more than 25% of the materials in India Flag Vessels instead of in U. S. Vessels.

7. The Union of India claimed that they were entitled to claim liquidated damages from Apeejay at the rate of 2% per month of the value of the materials amounting to a sum of Rs. 95.581.70. In the alternative, they claimed at the rate of 1% amounting to RS. 37,635.91 and in the further alternative, and without prejudice to the aforesaid the Union of India claimed that it suffered loss and damages and prayed that the Arbitrator should award such damages in their favour on such basis as the Arbitrator might think fit and proper.

8. Under those circumstances, the Union of India in its statement of claim claimed that it was entitled to collect the said sum of Rs. 1,99,156/-, under the said Bank Guarantee; and Rs. 95.581.70 being the liquidated damages calculated at 2% per month and, alternatively, at the rate of 1% per month amounting to Rs. 37.635.91 and, if necessary, an enquiry into the damages and an award for the sum to be found due after ascertaining such damages. Regarding forfeiture of the guarantee bond the Arbitrator considered three heads of breaches complained of Viz.

(a) non-delivery of a little over 162 Metric tonnes of goods in respect whereof the

Arbitrator found against Apeejay and awarded a sum of Rs. 7594.37 after calculating at the exchange rate of \$1 = Rs. 4.80.

The learned Judge of the Court below found no fault with the same and passed a decree in terms of the said award calculating interest on judgment and costs of filing the award nO appeal having been preferred, the same is not agitated before us.

(b) Regarding the commission of \$6910.13, which was drawn in America in dollars instead of in Rupees in India, Apeejay admitted the position but contended before the Arbitrator that this was so done erroneously by the foreign suppliers in America. It was also contended on behalf of Apeejay that the Union of India also contributed to the error by opening the letters of credit for 100% of the C. & F. Contract value instead of 99% which was the stipulated amount of the letters of credit to be opened. The said balance 1% was utilised as agreed commission and calculated in the F. O. B. Contract price. It appears that the Arbitrator chose to give his reasons in respect thereto and awarded the sum of Rs. 23,168.63 on account thereof. According to the Arbitrator :

"The loss to the Union of India because of this breach by the opposite party may be taken as equivalent to the then official exchange value in Rupees of the amount drawn in dollars."

The learned Judge of the Court below came to the finding that there was no basis for arriving at the said sum of Rs. 23,168.63. It was found that all that the Arbitrator had done was that he had awarded damages to the extent of the said sum on the basis of the exchange rate but that cannot be a basis of the damages. What the basis was was not stipulated by the arbitrator. The learned Judge observed that:

"The basis upon which the sum of Rs. 23,168.63 had been arrived at as damages suffered by the Government was not clear.

** ** * "There is no basis to indicate how the Government or the other parties lost the exchange of -- Rs. 23,168.63".

The learned Judge concluded that:

"No basis seems to have been indicated in the award when the Arbitrator has chosen to give his reasons."

In our opinion, the learned Judge was right in the view he has taken. The Arbitrator could not have awarded damages in the manner he has done particularly when he gave his reasons but without indicating the basis upon which such damages was being awarded. He has not chosen to award damages on the basis of the former market rate that might be prevailing at the relevant point of time. He has only found out what was the official exchange rate of dollars and on that basis he has calculated the full value of the dollars that was drawn in U. S. Dollars in America. What is difficult to appreciate is why the entire

dollar amount should be awarded as damages. Admittedly, some amount of the said sum of Rs. 23,168.63 would be payable to Apeejay on account of its remuneration but the same has not been taken into account by the Arbitrator in calculating damages. This appears to be an error on the face of it. Accordingly, the learned Judge was right in his finding that there is no basis to indicate how the Government had lost the exchange of Rs. 23,168.63. It is to be noted that the Arbitrator should have considered that in the statement of claim the Union of India claimed forfeiture of the Bank Guarantee and did not claim any damages in the manner it had been awarded to the Union of India. There is no indication in the award that such award was so made so that the same would be recovered from out of the said Bank Guarantee. Accordingly, in the absence of such pleading in the statement of claim and in the absence of the basis being disclosed by the finding of the Arbitrator in respect of the said sum the said award to that extent cannot be sustained. In our view, the learned Judge was right in his finding and was justified in setting aside the award to that extent inasmuch as it was found that the said amount was separable from the rest of the award. We are of the view that this was an error on the face of the award and accordingly the award to the said extent must be set aside.

Regarding (c) the Arbitrator has awarded a sum of Rs. 5000/- as token damages for delay in shipment on the presumption that Apeejay entered into the contract -- knowing of the difficulty in finding shipping space although he held that Apeejay was not very much to be blamed for the delay which was due to difficulty in finding shipping space. Here also the same reasons would apply. Apart from his presumption no basis was disclosed for awarding the said sum of Rs. 5000/- as damages. The sum was neither claimed in the statement of claim nor the sum could be so calculated as reasonable compensation and awarded even though compared to the total sum it was a small amount.

In our view, the court below was right in its finding that there was no basis upon which the said sum of Rs. 5000/- had been assessed as a reasonable compensation. We accordingly, hold that there is error on the face of the award on this account also and the learned Judge of the Court below was justified in setting aside the award to the extent of the said sum of Rs. 5000/-.

9. It is to be noted that in the statement, of claim the Union of India clearly stated that the claimant was entitled to collect the sum of Rs 1,99,156/- payable to the claimant under the said bank guarantee and retain the said sum against the respondent and the claim was, to the full extent of Rs. 1,99,156/-.

10. Regarding the delayed shipment of materials by Apeejay within the extended period of shipment the Union of India claimed liquidated damages at the rate of 2% and on the basis of such calculation the amount came to a sum of Rs. 95,581.70. The alternative claims have already been indicated but it appears that in the award no basis or finding has been arrived at in awarding the sum of Rs. 5,000. It appears from the award itself that on this point the Arbitrator has taken into consideration various extraneous matters and concluded in the

manner:

"I, therefore, find that the delay was due to the difficulty in finding shipping space in ships flying Indian and American Flags. This did not amount to Force Majoure, but it was factor for which the O. P. was not very much to blame, though it must be presumed that he had entered into the contract knowing of this difficulty in the shipping position. Considering all the circumstances. I consider that token damages of Rs. 5000/- only be reasonable compensation for the delayed shipment."

11. As stated hereinabove, the conclusion arrived at by the Arbitrator is arbitrary and without any basis and as such there is error en the face of the award which should accordingly be set aside in respect of the said sum so awarded.

12. That being the position, the appeal has no merit and the same is bound to be dismissed with costs.

C.K. Banerji J.

14. I agree.